Worldwide Platinum Records Sdn Bhd v Tan Sew Cheng

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-369–03 OF 2023
CHE MOHD RUZIMA, AZIMAH OMAR AND AZHAHARI RAMLI JJCA
3 SEPTEMBER 2024

Contract — Agreement — Loan agreement — Loan agreement between appellant and corporate entity — Defendant as agent issued undertakings to indemnify corporate entity — Appellant claimed refund of paid-up portion of fee paid to respondent — Whether impugned loan agreement should be read conjunctively or collectively with two undertakings — Whether appellant failed to prove validity and enforceability of impugned agreement and consequently validity and enforceability of two undertakings despite respondent submitting no case to answer — Whether restitution and unjust enrichment exception to maxim ex turpi causa non oritur action did not apply

This was an appeal against the decision of the learned judicial commissioner ('the JC') in dismissing the appellant's ('the plaintiff') claim against the respondent ('the defendant'). The plaintiff had entered into a loan agreement on 11 December 2016 ('the impugned loan agreement') for a 102m Euros with an American corporate entity, Noble Mettle LLC ('Noble') via the agency and representation of the defendant. The plaintiff was required to pay a processing and due diligence fee of 2m Euros (which 1m be paid upfront and the remainder 1m Euros be paid from the first drawdown of the loan). The plaintiff first directly paid to Noble the sum of 100,000 Euros via wire transfer. The remainder sum of 900,000 Euros were paid to Noble via lump sum cash payment in foreign SGD currency and indirectly to the defendant ('foreign SGD payment'). The defendant issued two undertakings dated 30 December 2016 and 23 October 2017 to 'indemnify' Noble by undertaking to fully refund the paid-up portion of the fee in the event that Noble breaches the impugned loan agreement. When the promised loan was not forthcoming from Noble, the plaintiff claimed for the return of the monies paid to the defendant as agent of Noble. The plaintiff obtained summary judgment on the pretext of the defendant's supposed admission of indebtedness via the two undertakings. The Court of Appeal in allowing the appeal by the defendant had reversed the High Court decision and ordered a full trial with specific issues to be tried. The plaintiff did not appeal against the Court of Appeal's decision to the Federal Court. Thus, the plaintiff's claim then was remitted back to the High Court for full trial. The plaintiff only proffered one singular witness while intentionally withholding a key and material witness ie the signatory of the impugned loan agreement. The defendant opted to submit a no case to answer

and elected not to call any witness from the defendant's side. Upon full trial and the plaintiff's outright refusal to call key and material witnesses to testify on the loan agreement, the JC had dismissed the plaintiff's claim. Hence, this appeal.

Held, dismissing the appeal:

(1) (**per Azimah Omar JCA, majority**) The Court of Appeal (when reversing the High Court's prior summary judgment) had made clear finding and pronouncement that the undertakings must be read together with the impugned loan agreement for proper context. Since this decision by the Court of Appeal was not appealed against, then it must only mean that the plaintiff admitted the correctness of the Court of Appeal's finding that the inexplicable undertakings could not be read in isolation from the impugned loan agreement. Thus, the plaintiff could not maintain its stance that it was sufficient for it to merely prove the defendant's supposed 'admission of indebtedness' via the two inexplicable undertakings. An isolated reading of the two inexplicable undertakings would indubitably yield a commercially insensible and nonsensical result. It did not and could not make any sense that the defendant would intentionally 'admit' to an indebtedness without any spec of context or 'genesis' underlying the supposed indebtedness. Therefore, the first issue was answered in the positive. The JC was indeed correct to conjunctively or collectively read the impugned loan agreement together with the two inexplicable undertakings (see paras 29–30, 32 & 34).

(2) (**per Azimah Omar JCA, majority**) The defendant had sought to discharge its evidential burden of proof ('EVB') to prove illegality by questioning the illegal features of the transaction to the plaintiff's sole witness. Thus, when the plaintiff's sole witness was unable to explain the illegalities of the transaction, the defendant would have successfully discharged its EVB to prove illegality. The JC was also right to draw an adverse inference under s 114(g) of the Evidence Act 1950 at the end of the plaintiff's case for the plaintiff's inexplicable refusal to put forth the signatory to the impugned loan agreement (see paras 46 & 48).

(3) (**per Azimah Omar JCA, majority**) The plaintiff itself had failed to discharge its own legal burden of proof ('LB') to prove the validity and enforceability of the impugned loan agreement. Notwithstanding and apart from the defendant's decision to submit no case to answer, it was still strictly incumbent upon the plaintiff to prove that the impugned loan agreement was a valid and legal agreement (and not a sham moneylending or money-laundering scheme rife with inexplicable features). The present case was not the typical case of illegality in that the illegality was the 'alter ego' masquerading as a legitimate debt or transaction but dealt with the illegality of the primary form itself from the outset. Since the plaintiff was claiming for damages arising from this

illegal primary form itself, the plaintiff's own LB from the outset would require the plaintiff to prove that the foreign SGD payment was a legal transaction that was not in contravention with any laws. It was no longer sufficient that the plaintiff only proved the defendant's admission of indebtedness as the entire legality of the transaction was already impugned ex facie (*ex turpi causa non oritur actio*). Therefore, the second issue was answered in the positive. The JC was certainly correct to find that the plaintiff ultimately failed to prove the validity and enforceability of the impugned loan agreement (and consequently the validity and enforceability of the two undertakings) despite the defendant submitting a no case to answer (see paras 49–50, 52, 54, 56 & 65).

(4) (**per Azimah Omar JCA, majority**) The plaintiff could not simply sweep the illegal and dubious features of the impugned loan agreement under the rug and use the court process as a platform to 'roll the dice' in hopes that the court would somehow just focus on the supposed 'admission' of indebtedness via the two inexplicable undertakings. And since the plaintiff had failed to adduce any evidence to prove the contrary, the JC was correct to find that the impugned loan agreement and the undertakings were illegal and unenforceable. To allow any form of restitution or compensation to arise from the impugned loan agreement or the inexplicable undertakings would only breathe a semblance of legitimacy to the same illegalities (see paras 70–72).

(5) (**per Che Mohd Ruzima Ghazali JCA, dissenting**) There was a judicial admission by the defendant on the given undertaking. The JC failed to acknowledge the fact that there was a judicial admission by the defendant regarding the letter of undertakings. The JC accepted PW1's testimony in relation to the plaintiff's claim which was based on the letter of undertaking dated 30 December 2016 and hence, the JC should assume that the evidence adduced by PW1 must be true or correct. Obviously, the JC was plainly wrong in her conclusion that the plaintiff failed to proof its case by merely depending on the fact that PW1 had given an unsatisfactory answer during the cross-examination. By the submission of no case to answer, the defendant lost her opportunity to explain why there was delay in the acknowledgement by Noble which obviously supported the plaintiff's contention that the defendant failed to furnish the acknowledgement receipt in contravention of the letter of undertaking dated 30 December 2016. Thus, without such explanation, the plaintiff's evidence that the defendant breached the letter of undertaking dated 30 December 2016 stood unrebutted. The defendant once again lost her opportunity to prove that the thumb printed and signed letter of undertaking and indemnity dated 23 October 2017 was obtained under duress and not voluntarily given. The basic principle that the court should accept the evidence adduced by the plaintiff as true or correct in a case where the defendant elected to submit no case to answer,

was not properly addressed. Therefore, the plaintiff had on balance of probability proved that the defendant breached her undertakings as claimed. The JC was plainly wrong in her decision to dismiss the plaintiff's claim (see paras 86, 90, 95 & 97–99).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK') yang menolak tuntutan perayu ('plaintif') terhadap responden ('defendan'). Plaintif telah memasuki perjanjian pinjaman pada 11 Disember 2016 ('perjanjian pinjaman yang dipersoalkan') sebanyak 102 Euros juta dengan entiti korporat Amerika, Noble Mettle LLC ('Noble') melalui agensi dan representasi defendan. Plaintif dikehendaki membayar yuran pemprosesan dan usaha wajar sebanyak dua juta Euros (dengan satu juta Euros dibayar terlebih dahulu dan baki satu juta Euros dibayar daripada pengeluaran pertama pinjaman tersebut). Plaintif pertama kali membayar secara langsung kepada Noble sejumlah 100,000 Euros melalui pindah kawat. Baki 900,000 Euros dibayar kepada Noble melalui pembayaran tunai sekali gus dalam mata wang asing SGD dan secara tidak langsung kepada defendan ('pembayaran asing SGD'). Defendan telah mengeluarkan dua surat akujanji bertarikh 30 Disember 2016 dan 23 Oktober 2017 untuk 'melindungi' Noble dengan berjanji untuk mengembalikan sepenuhnya bahagian yuran yang telah dibayar sekiranya Noble melanggar perjanjian pinjaman yang dipersolakan. Apabila pinjaman yang dijanjikan tidak diterima daripada Noble, plaintif menuntut pemulangan wang yang telah dibayar kepada defendan sebagai agen Noble. Plaintif telah memperoleh penghakiman terus dengan alasan pengakuan hutang defendan yang didakwa melalui dua surat akujanji tersebut. Mahkamah Rayuan, dalam membenarkan rayuan oleh defendan, telah membatalkan keputusan Mahkamah Tinggi dan mengarahkan perbicaraan penuh dengan isu-isu tertentu untuk dibicarakan. Plaintif tidak membuat rayuan terhadap keputusan Mahkamah Rayuan kepada Mahkamah Persekutuan. Oleh itu, tuntutan plaintif kemudiannya dikembalikan kepada Mahkamah Tinggi untuk perbicaraan penuh. Plaintif hanya mengemukakan seorang saksi tunggal sambil dengan sengaja tidak memanggil saksi penting dan material iaitu penandatangan perjanjian pinjaman yang dipersoalkan. Defendan memilih untuk mengemukakan tiada kes untuk dijawab dan tidak memanggil sebarang saksi dari pihak defendan. Setelah perbicaraan penuh dan keengganan mutlak plaintif untuk memanggil saksi-saksi utama dan material untuk memberi keterangan mengenai perjanjian pinjaman tersebut, PK telah menolak tuntutan plaintif. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan:

(1) (**oleh Azimah Omar HMR, majoriti**) Mahkamah Rayuan (ketika membatalkan penghakiman terus Mahkamah Tinggi) telah membuat penemuan dan pengumuman jelas bahawa surat akujanji tersebut mesti

dibaca bersama-sama dengan perjanjian pinjaman yang dipersoalkan untuk konteks yang tepat. Oleh kerana keputusan Mahkamah Rayuan ini tidak dirayu, maka ini hanya bermaksud bahawa plaintif mengakui ketepatan penemuan Mahkamah Rayuan bahawa surat akujanji yang tidak dapat dijelaskan tersebut tidak boleh dibaca secara terasing daripada perjanjian pinjaman yang dipersoalkan. Oleh itu, plaintif tidak boleh mengekalkan pendiriannya bahawa memadai untuk sekadar membuktikan 'pengakuan hutang' defendan melalui dua surat akujanji yang tidak dapat dijelaskan tersebut. Membaca surat akujanji secara terasing pastinya akan menghasilkan keputusan komersial yang tidak masuk akal. Adalah tidak logik bahawa defendan akan sengaja 'mengakui' hutang tanpa sebarang konteks atau asas yang mendasari hutang tersebut. Oleh itu, isu pertama dijawab secara positif. PK memang betul dalam membaca perjanjian pinjaman yang dipertikaikan bersama-sama dengan dua surat akujanji tersebut (lihat perenggan 29–30, 32 & 34).

(2) (**oleh Azimah Omar HMR, majoriti**) Defendan telah melepaskan beban pembuktian keterangan ('EVB') dengan mencabar ciri-ciri transaksi yang didakwa menyalahi undang-undang kepada satu-satunya saksi plaintif. Apabila saksi tunggal plaintif gagal menjelaskan kesalahan undang-undang transaksi tersebut, defendan dianggap berjaya memenuhi EVB mereka untuk membuktikan kesalahan undang-undang. PK juga berhak membuat anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 pada akhir kes plaintif kerana keengganan plaintif untuk mengemukakan penandatangan perjanjian pinjaman yang dipersoalkan tersebut (lihat perenggan 46 & 48).

(3) (**oleh Azimah Omar HMR, majoriti**) Plaintif sendiri telah gagal melepaskan beban pembuktian undang-undang ('LB') untuk membuktikan kesahihan dan kebolehkuatkuasaan perjanjian pinjaman yang dipersoalkan. Walaupun defendan memilih untuk mengemukakan tiada kes untuk dijawab, masih menjadi tanggungjawab plaintif untuk membuktikan bahawa perjanjian pinjaman yang dipersoalkan tersebut adalah sah dan bukannya skim pemberian pinjaman atau pengubahan wang haram yang penuh dengan ciri-ciri yang mencurigakan. Kes ini bukanlah kes tipikal mengenai kesalahan undang-undang, di mana kesalahan undang-undang menjadi 'alter ego' yang menyamar sebagai hutang atau transaksi sah, tetapi melibatkan kesalahan undang-undang dalam bentuk utama sejak awal lagi. Oleh kerana plaintif menuntut ganti rugi berdasarkan bentuk utama yang menyalahi undang-undang ini, LB plaintif sejak awal memerlukan bukti bahawa pembayaran asing SGD adalah transaksi yang sah dan tidak melanggar undang-undang. Oleh itu, isu kedua juga dijawab secara positif. PK betul dalam mendapati bahawa plaintif gagal membuktikan kesahihan dan kebolehkuatkuasaan perjanjian pinjaman yang dipersoalkan (dan akibatnya kesahihan serta

kebolehkuatkuasaan dua surat akujanji) walaupun defendan mengemukakan tiada kes untuk dijawab (lihat perenggan 49–50, 52, 54, 56 & 65).

(4) (**oleh Azimah Omar HMR, majoriti**) Plaintif tidak boleh sewenang-wenangnya mengabaikan ciri-ciri menyalahi undang-undang dan meragukan perjanjian pinjaman yang dipersoalkan dan menggunakan proses mahkamah sebagai platform untuk 'mencuba nasib' dengan harapan mahkamah hanya akan menumpukan pada 'pengakuan' hutang melalui dua surat akujanji yang tidak dapat dijelaskan. Oleh kerana plaintif gagal mengemukakan sebarang keterangan untuk membuktikan sebaliknya, PK adalah betul dalam mendapati bahawa perjanjian pinjaman yang dipersoalkan dan surat akujanji tersebut adalah menyalahi undang-undang dan tidak boleh dikuatkuasakan. Memberikan sebarang bentuk pemulihan atau pampasan yang timbul daripada perjanjian atau surat akujanji tersebut hanya akan memberi kesan untuk mengesahkan keharaman itu sendiri (lihat perenggan 70–72).

(5) (**oleh Che Mohd Ruzima Ghazali HMR, menentang**) Terdapat suatu pengakuan kehakiman oleh defendan berkenaan surat akujanji yang diberikan. PK gagal mengiktiraf fakta bahawa terdapat pengakuan kehakiman oleh defendan mengenai surat akujanji tersebut. PK menerima keterangan PW1 berkaitan tuntutan plaintif yang berdasarkan surat akujanji bertarikh 30 Disember 2016, dan oleh itu, PK seharusnya menganggap bahawa keterangan yang dikemukakan oleh PW1 adalah benar atau betul. Jelas sekali, PK telah membuat kesimpulan yang salah dengan mendapati bahawa plaintif gagal membuktikan kesnya hanya berdasarkan fakta bahawa PW1 memberikan jawapan yang tidak memuaskan semasa pemeriksaan balas. Dengan mengemukakan tiada kes untuk dijawab, defendan kehilangan peluang untuk menjelaskan sebab-sebab kelewatan pengesahan oleh Noble, yang jelas menyokong dakwaan plaintif bahawa defendan gagal menyediakan resit pengesahan tersebut, bertentangan dengan surat akujanji bertarikh 30 Disember 2016. Oleh itu, tanpa penjelasan tersebut, keterangan plaintif bahawa defendan melanggar surat akujanji bertarikh 30 Disember 2016 kekal tidak dicabar. Defendan sekali lagi kehilangan peluang untuk membuktikan bahawa surat akujanji bertanda cap ibu jari dan bertandatangan bertarikh 23 Oktober 2017 diperoleh di bawah paksaan dan bukan secara sukarela. Prinsip asas bahawa mahkamah seharusnya menerima keterangan yang dikemukakan oleh plaintif sebagai benar atau betul dalam kes di mana defendan memilih untuk mengemukakan tiada kes untuk dijawab, tidak ditangani dengan sewajarnya. Oleh itu, plaintif telah, berdasarkan imbangan kebarangkalian, membuktikan bahawa defendan telah melanggar akujanji seperti yang didakwa. PK telah membuat keputusan yang jelas salah dengan menolak tuntutan plaintif

(lihat perenggan 86, 90, 95 & 97–99).]

Cases referred to

Chan Kok Sung & Anor v Accupro Sdn Bhd & Anor [2024] 5 MLJ 144, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the Estate of Shofiah bte Ahmad, DECEASED) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281, FC (refd)

Kuan Kong Hong v Ng Kim Cheong & Anor [2023] 5 MLJ 644, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)

Mahmood bin Ooyub v Li Chee Loong and another appeal [2020] 6 MLJ 755, CA (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (folld)

Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81, CA (refd)

Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another [2018] 1 SLR 363; [2018] SGCA 5, CA (refd)

Orion Choice Sdn Bhd v Bellajade Sdn Bhd [2023] 5 MLJ 437, CA (refd)

Patel v Mirza [2016] UKSC 42, SC (folld)

Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770, SC (refd)

Sinarlim Sdn Bhd v Medallion Builders Sdn Bhd (dahulunya dikenali sebagai RC-Soils (M) Sdn Bhd) and others application [2012] MLJU 847, HC (refd)

Storey v Storey [1960] 3 All ER 279, CA (folld)

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609, FC (refd)

Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461, FC (refd)

Tai Thong Flower Nursery Sdn Bhd v Master Pyrodor Sdn Bhd [2014] 6 MLJ 341, CA (folld)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Tan Sew Cheng v Worldwide Platinum Records Sdn Bhd [2020] MLJU 248, CA (refd)

Yam Kong Seng & Anor v Yee Weng Kai [2014] 4 MLJ 478, FC (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2010] 1 MLJ 85, CA (refd)

Yui Chin Song & Ors v Lee Ming Chai & Ors [2019] 6 MLJ 417; [2019] 7 CLJ 740, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Evidence Act 1950 ss 101(1), 114(g)
Exchange Control Act 1953
Financial Services Act 2013
National Land Code s 214A

Appeal from: *Tan Sew Cheng v Worldwide Platinum Records Sdn Bhd* [2020] MLJU 248 (Court of Appeal, Putrajaya)

Lim Choon Khim (with Chin Yan Leng and David Yii Hee Kiet) (CK Lim Law Chambers) for the appellant.
Walter Pereira (with Annie Gomez) (Kamarudin & Partners) for the respondent.

Azimah Omar JCA:

INTRODUCTION

[1] This present appeal before this court was filed against the decision of the learned judicial commissioner ('learned JC') dismissing the appellant-plaintiff's claim against the respondent-defendant with costs of RM10,000.

[2] The appellant-plaintiff claimed for the return of a sum of 1m Euros (which is equivalent to approximately RM4.82m) which was supposedly remitted by the appellant-plaintiff to the respondent-defendant as an agent to an American corporate entity, Noble Mettle LLC ('Noble') under the terms of a loan agreement for a fantastical amount of one hundred and two million Euros (102m Euros).

[3] The parties hereinafter will be referred to as they were in the high court.

[4] The plaintiff ('Worldwide Platinum Records Sdn Bhd') had entered into a loan agreement for a 102m EUROS (MORE THAN RM500m) with Noble via the agency and representation of the defendant, an individual by the name of 'Tan Sew Cheng'.

[5] Despite a whopping HALF A BILLION RINGGIT loan amount which Noble had agreed to extend to the plaintiff, the plaintiff had pleaded that Noble still inexplicably required the plaintiff to pay a processing and due diligence fee of two million Euros (which one million Euros be paid upfront and the remainder one million Euros be paid from the first drawdown of the half a billion ringgit).

[6] I must also remark the puzzling 'split' manner in which the first tranche of the processing and due diligence fee was paid by the plaintiff on 31 December 2016. The plaintiff first directly paid to Noble the sum of 100,000 Euros via *wire transfer*. However, despite being able to pay directly the 100,000 Euros via *wire transfer*, the plaintiff had claimed that the remainder sum of 900,000 Euros were paid to Noble in following manner:

(a) VIA LUMP SUM CASH PAYMENT IN FOREIGN SGD CURRENCY; and

(b) INDIRECTLY TO THE DEFENDANT (for onwards transmission to Noble).

[7] When the promised half a billion-Ringgit loan was not forthcoming from Noble, *instead of actively pursuing Noble for the release of the larger pool of money*, the plaintiff was bent on securing a 'refund' of the monies paid to the defendant (as agent of Noble).

[8] The plaintiff's peculiar abandonment of the half a billion Ringgit loan (from Noble) and tenacity to instead chase after the markedly lesser 1m Euros processing fee (from the defendant) was so peculiar to the extent that the Court of Appeal had already put the legitimacy of this loan agreement to serious question (and postulated the 'likelihood' that the fantastical features of this loan agreement was a mere smokescreen of a moneylending or money laundering scheme).

[9] The bizarre facts and features underlying the logic-defying loan agreement had already been put to serious question at the Court of Appeal level when the Court of Appeal had reversed a prior High Court decision (which initially allowed a summary judgment entered in favour of the plaintiff). The Court of Appeal in allowing the appeal by the defendant (against the decision granting the plaintiff summary judgment) had reversed the High Court decision and ordered a full trial with *specific issues to be tried to scrutinise and examine the stupefying and illegal features rife within the impugned loan agreement*.

[10] At the end of the plaintiff's case, the plaintiff had obviously failed to discharge its own legal burden to prove a legally enforceable loan agreement to seek for a refund. Thus, considering the plaintiff's absence of a case, the defendant opted to submit a no case to answer (and elected not to call any witness from the defendant's side). Upon full trial and the plaintiff's outright refusal to call key and material witnesses to testify on the stupendous loan agreement, the learned JC had rightfully and astutely dismissed the plaintiff's claim.

[11] Dissatisfied with the learned JC's dismissal of its claim, the plaintiff appealed to the Court of Appeal.

[12] In any case, it is only apt for me to first set out the facts underlying the plaintiff's bizarre claim before proceeding to analyse into the learned JC's decision.

BACKGROUND FACTS OF THE CASE

[13] The plaintiff via its Managing Director, Dato' Law Eng Hock had entered into a loan agreement dated 11 December 2016 ('impugned loan agreement') with a supposedly American company, Noble.

[14] The defendant ('Tan Sew Cheng') was the supposed Malaysian representative of Noble. Under the impugned loan agreement, Noble had agreed to grant a loan of 102m Euros (half a billion Ringgit) to the plaintiff. Despite the astounding liquidity of Noble (to the extent that it was in a financial position to disburse half a billion Ringgits in loan facility), Noble somehow required that the plaintiff remit a sum of 2m Euros as administrative and due diligence fee ('supposed fee').

[15] The first 1m Euros of the supposed fee was required to be paid upfront while the remainder shall be deducted from the first drawdown of the initial 1m Euros of the half billion-Ringgit loan.

[16] Adding further peculiarity to the plaintiff's claim, was the manner in which the first 1m Euros of the supposed fee was paid by the appellant. Instead of directly paying Noble the first half of the supposed fee, the plaintiff inexplicably had split the payment in the following manner:

(a) *direct wire transfer of 100,000 Euros* from the plaintiff directly to Noble on 30 December 2016; and

(b) Remainder 900,000 Euros *paid by cash in the form of foreign Singaporean Dollar (SGD) currency (1,362,850 SGD)* indirectly paid to Noble via the respondent ('foreign SGD payment').

[17] It was never explained by the plaintiff as to the logical reasoning behind its peculiar decision to use cash payment in foreign SGD currency when it had already been established that the plaintiff had direct account details and credentials to directly wire payments to Noble.

[18] It was immensely more bizarre that the defendant would somehow issue an undertaking dated 30 December 2016 to 'indemnify' the multimillion-dollar American company, Noble by undertaking to fully

'refund' the paid-up portion of the supposed fee in the event that Noble breaches the impugned loan agreement ('first inexplicable undertaking'). It was markedly peculiar that a mere agent or representative (not even a Director or shareholder of Noble) would put herself at personal risk especially considering the seemingly 'robust' financial standing of Noble.

[19] It was undisputed that Noble had failed to make good of its promise under the impugned loan agreement. The stupefying half a billion-Ringgit loan was not forthcoming from Noble (which to me was hardly a surprise considering the dubious features of the entire transaction). Even after all that song and dance, the plaintiff somehow was not so much perturbed by Noble's blatant breach of the impugned loan agreement (and deprivation of the promised half a billion-Ringgit loan), and instead was adamant to embark on a 'side quest' to instead pursue the measly foreign SGD payment that was remitted to Noble via the defendant.

[20] The plaintiff embarked on a full pursuit against the defendant to obtain a 'refund' of the foreign SGD payment. Adding further peculiarity to the plaintiff's claim, the defendant somehow had signed another undertaking dated 23 October 2017 ('second inexplicable undertaking') while she was detained in police lock-up in Penang.

[21] The plaintiff by and large attempted to *isolate* the two inexplicable undertakings from the underlying and inextricably woven background of the impugned loan agreement. It was upon these two inexplicable undertakings that the plaintiff initially felt misguidedly assured and confident to obtain summary judgment (on the pretext of the defendant's supposed admission of indebtedness via the two inexplicable undertakings). Instead, the Court of Appeal was quick and astute to disagree with the plaintiff and identify the bizarre and peculiar features of the impugned loan agreement.

[22] It is opportune here for me to reproduce the Court of Appeal's grounds of decision as reported in *Tan Sew Cheng v Worldwide Platinum Records Sdn Bhd* [2020] MLJU 248:

> [9] Here, the *defence is not one of mere platitude; it raises serious issues on the validity of the very agreement which the respondent entered with Noble Mettle, that the undertaking is necessarily one which is to be read together with that agreement*, whether contextual or more; that divorced of the underlying agreement between the respondent and Noble Mettle, there really would have been no need for such an undertaking, written or even verbal.
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> ...
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> [11] However, despite that payment which was acknowledged many months later in October of the following year for unexplained reasons, *which delay is not disputed or*

even the subject of any complaint by the respondent, the respondent did not obtain that loan of 102m Euros.

[12] The appellant has raised concerns and questions over the respondent's payment of the 900,000 Euros in cash of SGD1,362,850. *Prior to this payment, the respondent had itself remitted directly to Noble Mettle the sum of 100,000 Euros. The sum of SGD1,362,850 was given in cash by the respondent's director to the appellant* to remit to Noble Mettle.

[13] The agreement, though seemingly simple and straightforward was without legal assistance, and this has raised concerns as to the propriety of the agreement and the related arrangements including the undertaking by the appellant and the payment and onward remittance of 900,000 Euros by the appellant to Noble Mettle.

[14] This 900,000 Euros is a very substantial sum by any measure and the *circumstances surrounding its payment and the arrangement for its payment and remittance to Noble Mettle, a foreign institution merits proper examination and consideration through a trial. EVEN THE LOAN SUM OF 102 MILLION EUROS REQUIRES EXAMINATION*. The payment of 900,000 Euros would, amongst others, *be relevant to the issue of whether there are any violations or contraventions of any monetary regulations including those under the Financial Services Act 2013, Exchange Control Act and even under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*. The appellant has adduced evidence to the effect that the respondent's director who made the payment was fully aware of the *strict enforcement by Bank Negara and that its approval would be required before the monies could leave or enter our shores*.

[15] It would seem to us that *if that payment of SGD1,362,850*, paid by the respondent to Noble Mettle under its agreement with Noble Mettle *was in any way contrary to any of those laws mentioned*, then surely *any refund would similarly suffer the same fate under the principle of ex turpi causa non oritur actio and that the respondent may possibly be in pari delecto to the illegality or wrongful act*, or at the very least, this issue warrants further examination.

[16] *It was also erroneous for the learned judge to say that the loan agreement with Noble Mettle had no connection whatsoever with the letter of undertaking; the two were plainly and obviously inter-related*. At this point, we are incline to say that the appellant has raised very real and serious questions of illegality which must be examined properly for its full facts and circumstances. The respondent's knowledge or awareness of those facts would also be material to that determination.

[17] *We cannot shut our eyes to THE PLAINLY UNUSUAL ARRANGEMENTS PERTAINING TO THE SUBSTANTIAL LOAN IN A FOREIGN CURRENCY WHICH REQUIRED PRIOR PAYMENT from the potential borrower in the person of the respondent even before it receives any part of that substantial loan*; and which suggest some *real concerns on its validity and legality that must be scrutinised* by the court. The lending transaction in the agreement is even questioned as being *an unauthorized transaction or even an ILLEGAL MONEY LENDING/LAUNDERING TRANSACTION*. See cases such as *Norihan bt Talib (sued in her personal capacity and trading under the name 'Tanjung Trading') & Ors*

v Mohd Nasir bin Hassan & Ors (suing on their own behalf and for 420 others as per list at 'Appendix A') and another appeal [2018] 3 MLJ 670; [2017] MLRAU 1 and *Lim Xue Shan & Anor v Ong Kim Cheong* [1990] 3 MLJ 449. (Emphasis added.)

[23] The plaintiff *did not appeal against the Court of Appeal's decision* to the Federal Court. Thus, the plaintiff's claim then was remitted back to the High Court for full trial on the following specific premises and questions posed by the Court of Appeal ('threshold issues'):

(a) the two inexplicable undertakings *must be conjunctively read and examined together* with the impugned loan agreement between Noble and the plaintiff so as to appreciate the true context in which the inexplicable undertakings were entered into;

(b) the plaintiff must justify and explain its inexplicable delay and nonchalance against the ten months' delay between the cash foreign SGD payment (30 December 2016) and Noble's delayed acknowledgment of receipt (on 9 October 2017);

(c) the plaintiff must justify and explain its inexplicable insistence to chase after the refund of the foreign SGD payment against the defendant instead of pursuing the larger half a billion-Ringgit loan disbursement against Noble;

(d) the plaintiff must justify and explain the inexplicable terms of the impugned loan agreement in which Noble somehow still required a comparatively measly 2m Euros in supposed fees to be paid before Noble would disburse the half a billion-Ringgit loan under the impugned loan agreement;

(e) the plaintiff must justify and explain the features of the impugned loan agreement which were in contravention of monetary regulations under the Financial Services Act 2013 ('the FSA'), the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUA'), the Exchange Control Act 1953 ('the ECA') and numerous guidelines and bye- laws issued by the Ministry of International Trade and Industry ('MITI') and Bank Negara Malaysia ('BNM'); and

(f) the plaintiff must justify and explain the plaintiff's insistence to indirectly pay the supposed fee via cash in foreign SGD currency to the defendant, when the plaintiff supposedly was already able to directly wire transfer the initial 100,000 Euros to Noble.

[24] With all the threshold issues laid down by the Court of Appeal, the plaintiff's legal burden to prove its claim must withstand and overcome the threshold of all of the issues raised by the Court of Appeal. Despite the obvious

hurdles that the plaintiff was supposed to overcome, the plaintiff ultimately only proffered one singular clueless witness while intentionally withholding a key and material witness (being the signatory of the impugned loan agreement itself, one Dato Law Eng Hock).

[25] The learned JC found that the lone clueless witness was evasive at best, and was unable to shed any light whatsoever into any of the questions posed by the Court of Appeal (during cross-examination by the defendant's counsel).

[26] The only material testimony he proffered was that the proper person to be asked these questions was actually Dato Law Eng Hock (the exact person the plaintiff refused to tender or produce before the High Court).

[27] At the closing of the plaintiff's case, the defendant was confident (and I am in agreement) that the plaintiff had either failed to discharge its legal burden to prove a legitimate and enforceable loan agreement or that even if the plaintiff's evidence were admitted at face value, the plaintiff still failed to establish a case against the defendant. Thus, the defendant rightfully and understandably opted to submit no case to answer. Unsurprisingly, the learned JC accordingly dismissed the plaintiff's claim.

THE PRESENT APPEAL

[28] I have perused the plaintiff-appellant's memorandum of appeal, records of appeal, and the parties' respective written submissions and I am of the view that the appeal before this court can be appropriately be disposed of by determining the following issues:

(a) first issue: Whether or not the learned JC was correct to conjunctively or collectively read the impugned loan agreement together with the two inexplicable undertakings; and

(b) second issue: Whether or not the learned JC was correct to find that the plaintiff ultimately failed to prove the validity and enforceability of the impugned loan agreement (and consequently the validity and enforceability of the two inexplicable undertakings) despite the defendant submitting a no case to answer.

FIRST ISSUE: WHETHER OR NOT THE LEARNED JC WAS CORRECT TO CONJUNCTIVELY OR COLLECTIVELY READ THE IMPUGNED AGREEMENT TOGETHER WITH THE TWO INEXPLICABLE UNDERTAKINGS

[29] In actuality, it was no longer open for the plaintiff to contend on the isolated and separate reading of the two inexplicable undertakings from the

impugned loan agreement. It must be highlighted that the Court of Appeal (when reversing the High Court's prior summary judgment) *had made clear finding and pronouncement that the undertakings must be read together with the impugned loan agreement for proper context*. Since this decision by the Court of Appeal was not appealed against, then it must only mean that the plaintiff admits the correctness of the Court of Appeal's finding that the inexplicable undertakings cannot be read in isolation from the impugned loan agreement. Suffice we refer to the Federal Court decision in *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461:

> The plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that the *plaintiff accepted the correctness of the decision to dismiss its suit*. (Emphasis added.)

[30] Thus, the plaintiff cannot maintain its stance that it was sufficient for it to merely prove the defendant's supposed 'admission of indebtedness' via the two inexplicable undertakings.

[31] I must emphasise that the threshold of the plaintiff's legal burden of proof remains that the plaintiff must necessarily prove the legality and validity of the impugned loan agreement itself, before the inexplicable undertakings can find any semblance of legitimacy.

[32] In any case, an isolated reading of the two inexplicable undertakings would indubitably yield a commercially insensible and nonsensical result. It does not and cannot make any sense that the defendant would intentionally 'admit' to an indebtedness without any spec of context or 'genesis' underlying the supposed indebtedness.

[33] I must emphasise and reiterate and that our courts have adopted the business common sense rule of contractual interpretation especially in cases where mere literal semantics of a contract would lead to an absurd result. In such cases, it is only just that the court looks beyond the written terms of a contract, and consider all surrounding facts and documents to ascertain the true genesis of the contractual relationship. Suffice to refer to the salutary words of the Federal Court in *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770:

> *In this case, we would also assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading* and the kind which is actionable in a passing off action. We would also adopt the same reasoning to say that we should not manipulate the contractual word 'competition' used in cl 5 to say that the appellants cannot be restrained from unfair competition. We would also quote and adopt the following words of Lord Diplock in yet another recent case of *Antaios Compania Naviera SA v Salen Rederierna AB:11*

> *... if detailed semantic and syntactical analys is of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense*. (Emphasis added.)

(See also *Kuan Kong Hong v Ng Kim Cheong & Anor* [2023] 5 MLJ 644; *Orion Choice Sdn Bhd v Bellajade Sdn Bhd* [2023] 5 MLJ 437.)

[34] In view of all the aforementioned deliberations I hereby answer the *first issue in the POSITIVE*. The learned JC was indeed correct to conjunctively or collectively read the impugned loan agreement together with the two inexplicable undertakings.

SECOND ISSUE: WHETHER OR NOT THE LEARNED JC WAS CORRECT TO FIND THAT THE PLAINTIFF ULTIMATELY FAILED TO PROVE THE VALIDITY AND ENFORCEABILITY OF THE IMPUGNED AGREEMENT (AND CONSEQUENTLY THE VALIDITY AND ENFORCEABILITY OF THE TWO INEXPLICABLE UNDERTAKINGS) DESPITE THE DEFENDANT SUBMITTING A NO CASE TO ANSWER

[35] Considering my positive answer in the first issue, it remains imperative for the plaintiff to discharge its legal burden of proof to prove that the impugned loan agreement itself was valid and enforceable. However, instead of appropriately furnishing evidence and explaining the dubious features of the impugned loan agreement, the plaintiff had staunchly and desperately clung onto the contention that the defendant had 'admitted' her indebtedness via the two inexplicable undertakings. Thus, here I am faced with the conundrum of a debt that was both:

(a) an *ADMITTED* debt owed; and

(b) an *ILLEGAL* debt owed.

[36] Adding further nuance to the case, the *dubious nature and the legality of the debt was put to serious question by the Court of Appeal* when the Court of Appeal first overturned the High Court's decision to allow the plaintiff's summary judgment application. From the last hearing, I am moved to examine further as to where and how does the burden of proof (both legal and evidential) shifts in this case.

[37] A dissonance arose because this court was faced with: (1) the general and trite rule that the party who asserts illegality shall bear the burden of proof to prove the existence of the illegality; and (2) the fact that the defendant had opted to not call any evidence and submitted a no case to answer:

(a) *the plaintiff argued* based on the *general rule* that *the party who asserts illegality must bear the burden to prove said illegality*. Thus, arguably since the defendant has not called any evidence, it cannot be said that the defendant had discharged its burden of proof to prove illegality;

(b) the *defendant argued* that following the same general rule as the plaintiff, the defendant had discharged its evidential burden of proof to prove illegality *when the defendant had posited questions on the illegal and dubious nature of the transaction during the cross-examination of the plaintiff's sole witness (OF WHICH THE WITNESS FAILED TO ANSWER OR JUSTIFY ALL and ANY OF THE ILLEGALITIES RAISED)*; and

(c) alternatively, considering the unique circumstance of this case (where the Court of Appeal had already called the plaintiff out to explain the illegalities) *the plaintiff (EVEN BEFORE THE SHIFT OF EVIDENTIAL BURDEN OF PROOF TO THE defendant) already bears the LEGAL burden of proof to prove the legitimacy and legal actionability of the debt*.

[38] Thus, to my mind the case can be deliberated from two distinct angles:

(a) illegality in the instance of the general or classical shift of EVIDENTIAL burden of proof; or

(b) illegality in the instance of the plaintiff's own LEGAL burden that does NOT SHIFT.

Illegality in the instance of the general or classical shift of evidential burden of proof

[39] It is trite law that there are two types of burden of proof. The first being *LEGAL BURDEN* of proof ('LB') that does NOT SHIFT and always lies on the plaintiff to prove its claim. On the other hand, when the plaintiff discharges the initial LB, the *EVIDENTIAL BURDEN* of proof (onus of proof) ('EVB') shifts onto the defendant to refute the plaintiff's case. This has been astutely explained by the Federal Court in the landmark decision in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697:

> [51] There is an essential distinction between burden of proof and onus of proof, *burden of proof lies upon the person who has to prove a fact and it NEVER SHIFTS*, but the onus of proof shifts' (*Addagada Raghavamma And Anr v Addagada Chenchamma And Anr* 1964 SCR (2) 933).
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> [52] The 'burden of proof' in s 101 is the burden to establish a case which rests throughout on the party who asserts the affirmative of the issue. The 'burden of proof' in s 102 is the burden to adduce evidence, to make out or rebut the claim.

> The 'burden of proof' in s 102 shifts from one side to the other according to the weight of the evidence. *To differentiate the sense used, the 'burden of proof' in s 101 is 'burden of proof', while the 'burden of proof' in ss 102 and 103 is dubbed 'onus of proof'. In some jurisdictions, the s 101 'burden of proof' is labelled 'legal burden' while the s 102 burden of proof' is referred to as 'evidential burden'.*

[40] Now, the plaintiff was adamant that EVB had already shifted onto the defendant when the plaintiff discharged its LB by proving the defendant's indebtedness via an 'admission' by way of the two inexplicable undertakings. The plaintiff further argued that the defendant had failed to discharge its EVB to prove illegality as the defendant had not led any evidence and chose to submit no case to answer.

[41] Assuming that I should follow the classical and trite shifting of the EVB subsequent to the plaintiff's discharge of its LB, then the plaintiff must first discharge its LB.

[42] I shall first explore the hypothesis that the plaintiff had hypothetically discharged its LB by merely proving the defendant's indebtedness via the two inexplicable undertakings (which in truth there was no such admission). Thereafter, the EVB shall shift onto the defendant to rebut this indebtedness. And since the defendant's rebuttal against the indebtedness was illegality, then the EVB lies on the defendant to prove illegality.

[43] Following this classical shifting of EVB, can the plaintiff simply argue that the defendant had not discharged its EVB merely because the defendant had not called any witnesses after the close of the plaintiff's case?

[44] Now, can the plaintiff argue that the defendant cannot discharge its EVB during the plaintiff's case before the close of the plaintiff's case? A *Federal Court authority* have *long held that the plaintiff's supposition is WRONG* in law.

[45] It is not at all any rule of law that a defendant must and can only discharge its EVB during the stage of the defendant's case. It is not at all the law that the defendant cannot discharge its EVB via cross-examination during the plaintiff's case. I need only refer to the Federal Court case of *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281. In *Keruntum*, the defendant also submitted a no case to answer.

> [78] It is settled law that the *burden of proof rests throughout the trial on the party on whom the burden lies*. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party (see *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4). *When the burden shifts to the other party, it can be discharged by cross- examination of witnesses of the party on whom the burden*

of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods.

[46] The ratio above clearly held that a defendant can discharge its EVB even as early as the plaintiff's case by cross-examining the plaintiff's witnesses during the stage of the plaintiff's case. This was exactly the instance in this case. The defendant had sought to discharge its EVB to prove illegality by questioning the illegal features of the transaction to the plaintiff's sole witness. *Thus, when the plaintiff's sole witness was unable to explain the illegalities of the transaction, THE RESPONDENT WOULD HAVE SUCCESSFULLY DISCHARGED ITS EVB TO PROVE ILLEGALITY.*

[47] This is squarely in line with the instructive Federal Court decision in *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 that the court must be vigilant of illegality *'AT ALL STAGES' of a case* even if illegality was not pleaded. It is thus clear that the defendant was well within its legal rights to prove illegality (discharge its EVB) during the stage of plaintiff's case well before closing the defendant's case by submitting no case to answer:

> [35] *Clearly, therefore, courts are bound AT ALL STAGES to take notice of illegality, WHETHER EX FACIE OR WHICH LATER appears, even though not pleaded, and to refuse to enforce the contract*. In that regard, we endorse the following statement of law by the Court of Appeal per Hamid Sultan JCA, delivering the judgment of the court, in *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1:
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> > *At the outset we must say that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality … whether or not it is the pleaded case of the parties* or whether the issue was raised during the trial. (Emphasis added.)

[48] On the same note, the learned JC was also right to draw an adverse inference under s 114(g) of the Evidence Act 1950 at the end of the plaintiff's case for the plaintiff's inexplicable refusal to put forth the signatory to the impugned loan agreement who was also the plaintiff's *Managing Director, Dato Law Eng Hock*. Instead, the plaintiff opted to produce one *Chua Yu Sheng (who was the supposed Project Advisor to the CEO of Ivory Properties Group Bhd)* who had nothing to do whatsoever with the impugned loan agreement. Nor did the plaintiff's sole witness had any material involvement or knowledge as to the terms and underlying facts surrounding the impugned loan agreement. The learned JC had rightfully appreciated that Chua Yu Sheng's lacklustre testimony had only gone as far as saying that he does not know anything, and that all these questions should be asked to Dato Law Eng Hock.

Illegality in the instance of the plaintiff's own legal burden that does not shift

[49] I am also of the considered view that totally separate and distinct of the defendant's EVB, the plaintiff itself had failed to discharge its own LB to prove the validity and enforceability of the impugned loan agreement. As had been clearly explained by the Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, a plaintiff's claim does not automatically become legitimate merely if the defendant had not put on a strong defence. Having to shoulder a permanent LB to prove its claim, the plaintiff's claim must also necessarily live and die by the plaintiff's own evidence (or lack thereof):

> [57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, *NOT ON HIM WHO DENIES* it; *et incumbit probation qui decit, nonqui negat, actori incibit probation … The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him. Hence the maxim Potior est condition defendantis. A plaintiff cannot obviously advantage himself by the weakness of the defence. A PLAINTIFF'S CASE MUST STAND OR FALL UPON THE EVIDENCE ADDUCED BY HIM*. (Emphasis added.)

[50] Therefore, notwithstanding and apart from the defendant's decision to submit no case to answer, it was still strictly incumbent upon the plaintiff to prove that the impugned loan agreement was a valid and legal agreement (and not a sham moneylending or money-laundering scheme rife with inexplicable features). This LB had always been and always will be laid upon the plaintiff's shoulders as the plaintiff. The salutary words of the Federal Court in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609:

> *… the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement* (see *Ranbaxy (Malaysia) Sdn Bhd v EI Du Pont De Nemours And Co* [2011] MLJU 1135; [2011] 1 AMCR 857). In other words, *it was upon the plaintiff itself, and CERTAINLY NOT THE defendant, to discharge the burden of showing the settlement agreement had come into existence*. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim (see *The Fordeco Nos 12 and 17; The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10* [2000] 1 MLJ 449, *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd And Other Appeals* [2004] 4 MLJ 105 and *Teh Swee Lip v Jademall Holdings Sdn Bhd* [2013] 6 MLJ 32). *It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses DID NOT ABSOLVE THE PLAINTIFF FROM DISCHARGING ITS BURDEN IN LAW*. (Emphasis added.)

[51] From the get go the Court of Appeal had already set the threshold of the plaintiff's LB to prove its case. The bar of the plaintiff's legal burden is NOT ONLY to prove the debt he claimed, BUT ALSO that the debt owed was *legally enforceable or actionable under the law*. It must be reiterated that the Court of Appeal explicitly reversed the plaintiff's summary judgment and *called out the plaintiff to explain or 'disprove' the many illegalities plaguing the impugned loan agreement*.

[52] Considering the above, the present case is not the typical case of illegality in that the illegality was the 'alter ego' masquerading as a legitimate debt or transaction. A typical case of 'underlying' illegality where an illegality was concealed by the façade of a primary form of legitimate transaction would be:

(a) SPA and land transfer instrument (primary form) used to conceal underlying illegal money-lending transaction (secondary illegality) (see *Mahmood bin Ooyub v Li Chee Loong and another appeal* [2020] 6 MLJ 755); or

(b) joint venture agreement (primary form) used to conceal underlying illegal money-lending transaction (secondary illegality) (see *Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another* [2018] 1 SLR 363; [2018] SGCA 5).

[53] In cases where a transaction's primary form was an allegedly legitimate transaction (ie SPA or JVA), then the plaintiff's legal burden can be discharged *by merely proving facts of the alleged legitimate transaction*.

[54] However, the case before us deals with the *illegality of the PRIMARY FORM itself* from the outset. The primary form of foreign SGD payment was already illegal by contravening prevailing laws and guidelines in force. Therefore, since the plaintiff is claiming for damages arising from this illegal primary form itself, *the plaintiff's own LB from the outset would require the plaintiff to prove that the foreign SGD payment was a LEGAL transaction that was not in contravention with any laws*.

[55] In the most succinct and simplest explanation possible: entirely distinct and separate from the defendant's EVB to disprove the legality of the impugned loan agreement, the plaintiff had already failed to discharge its own legal burden to prove that the impugned loan agreement and the two inexplicable undertakings were genuine, legitimate, valid, and enforceable agreements.

[56] Thus, independent from the shifting of the EVB, it becomes incumbent upon the plaintiff's own prior LB that the plaintiff must prove the legality and actionability of its claim. *This is squarely in line with the celebrated maxim that*

he who comes to the aid of the law must come with clean hands. It remains the plaintiff's own LB to prove that the primary form of the claim was legitimate and legally claimable by law. That would entail that the plaintiff must sufficiently explain and justify the numerous illegalities identified by the Court of Appeal in reversing the plaintiff's summary judgment prior. It is no longer sufficient that the plaintiff only proves the defendant's admission of indebtedness as the entire legality of the transaction was already impugned *ex facie* (*ex turpi causa non oritur actio*).

[57] It must sternly be minded that the LB of proof upon the plaintiff under s 101(1) of the Evidence Act 1950 is for seeking a judgment for a 'LEGAL right or liability'. Thus at the forefront of the plaintiff's own LB, the plaintiff must already come to court proving that his own affairs are in order within the confines of the law and legality. The plaintiff must first prove that his claim is LEGAL. This rule should be immutable.

[58] The only variable should ~~*only*~~ be the degree or threshold of legality of the claim that the plaintiff owed a LB to prove. In typical cases where the primary form was legitimate (while the defendant contends a secondary ulterior design of an illegality), then the threshold of LB owed should only be to prove the legality of the primary form. Then the EVB shall shift onto the defendant to prove the secondary ulterior illegality. But for instances alike in the case before us (where the primary form itself already contravened the law), then the threshold of the plaintiff's LB should also extend to not only proving the debt owed, but also that the debt itself was legal and enforceable by law.

[59] Debt can be owed in both realms of legality and illegality. For the plaintiff to succeed in a claim, he must *not only prove the debt, but the debt is one that CAN BE LEGALLY CLAIMED IN COURT*. Failure of which will denote that the plaintiff had not come to the court with clean hands. A debt owed by a brothel to a human trafficking syndicate can be admitted. A debt owed arising from an illegal money laundering/lending scheme also can be admitted. But those debts were owed out of an illegal consideration. Such debt should not stain the door of the court. The same rings true against the obviously dubious, illegal, and inexplicable impugned loan agreement before this court; it should have never been attempted to be enforced by abusing the court process.

[60] Thus, although generally the EVB to prove defence of illegality lies on the party asserting illegality, the court cannot ignore (and the plaintiff ought not simply abuse the process of the court to conceal) the glaring illegalities gleaning from the plaintiff's claim. Thus, alike in the case before us (where the primary form of the claim was already illegal) the plaintiff's own LB should also extend to the plaintiff proving the legality of its claim.

[61] It is also illogical to solely place EVB upon the defendant to prove illegality. The illegality existed in this case is on the *absence of due and proper consent, notification, and justification under prevailing statutes and bye-laws. HOW CAN THE defendant (ON ITS OWN EVIDENCE) PROVE 'ABSENCE' (OR SOMETHING THAT DOES NOT EXIST)?* The logical answer is that the defendant can only do so by putting the plaintiff through the wringer (for the plaintiff to discharge its LB and disprove illegality by furnishing evidence that the plaintiff indeed had complied with all the prevailing laws). Thus, *it remains inescapable that the burden (be it LB or even EVB) shall still lie on the plaintiff to prove its claim by proving that the impugned loan agreement was legal and enforceable by law*.

[62] We can draw some guidance from the Court of Appeal case of *Tai Thong Flower Nursery Sdn Bhd v Master Pyrodor Sdn Bhd* [2014] 6 MLJ 341. In *Tai Thong*, the plaintiff commenced an action for vacant possession of land. The plaintiff claims that it was the rightful registered proprietor of the land. Nonetheless, the defendant *raised illegality of the plaintiff's proprietorship as the transfer to the plaintiff's had not received prior approval under* s 214A of the National Land Code 1965**.**

[63] The Court of Appeal held that since the plaintiff seeks to claim registered ownership rights over the land, *THE PLAINTIFF OWED THE BURDEN OF PROOF TO PROVE THE LEGALITY OF ITS PROPRIETORSHIP*. Thus, independent of any shifting of EVB to the defendant, the COA held that it was already incumbent of the plaintiff to prove the legality of its claim:

> [48] In our considered view, *the burden was on the plaintiff to prove that it was the lawful registered owner* of the subject land.
>
> [49] When the illegality of the plaintiff's registration as proprietor of the subject land for contravention of s 214A of the NLC was raised, *THE BURDEN, IN OUR VIEW, WAS STILL ON THE PLAINTIFF TO PROVE THAT THERE WAS NO SUCH ILLEGALITY and that the necessary approval under that section had been obtained*. (Emphasis added.)

[64] In any case, I find that it would set an undesirable precedent if I do not insist upon the plaintiff to prove the legality of its claim from the outset (as the plaintiff's LB to prove its case). I should set a precedent that the court ought to be vigilant to weed out illegal claims and to discourage unscrupulous parties to try their luck to breathe life into an illegal claim through the court's process (in hopes that the defendant does not (or could not afford to) defend himself appropriately).

[65] Considering all of the aforementioned deliberation and findings under this heading, I hereby answer *the second issue in the POSITIVE*. The learned JC

was certainly correct to find that the plaintiff ultimately failed to prove the validity and enforceability of the impugned loan agreement (and consequently the validity and enforceability of the two inexplicable undertakings) despite the defendant submitting a no case to answer.

THE RESTITUTION AND UNJUST ENRICHMENT 'EXCEPTION' (IN *PATEL V MIRZA*) TO THE MAXIM EX TURPI CAUSA NON ORITUR ACTIO DOES NOT APPLY IN THE PRESENT CASE

[66] In recent times, the courts across many jurisdictions (particularly within the Commonwealth) had been called to re-assess the rigidity of the maxim *ex turpi causa non oritur actio* especially against persons in *pari delicto* (who were complicit) in the illegality who stood to wield illegality as a shield to escape unscathed and to an extent, even attain unjust enrichment. In fact, the Court of Appeal in the case of *Chan Kok Sung & Anor v Accupro Sdn Bhd & Anor* [2024] 5 MLJ 144 very recently had digested this particular movement in the legal landscape especially in light of the landmark English case of *Patel v Mirza* [2016] UKSC 42. It is opportune that I reproduce the salient portions of the decision here:

> [50] SECONDLY, in very recent times, our apex court had also followed the English position in the UK Supreme Court's landmark decision in *Patel v Mirza* [2016] UKSC 42. In *Patel*'s case, the UK Supreme Court dealt with a similar circumstance where a delinquent contracting party had sought to excuse himself out of a breach by brandishing illegality as means to invalidate the entire contract he was initially bound to.
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> [51] In *Patel*'s case, the UK Supreme Court had to reconsider and rethink the rigidity of the trite rule against illegality (the latin maxim of *ex turpi causa non oritur actio*) that might unfortunately cause a co-conspirator to an illegality to be unjustly enriched, at the expense of the other co-conspirator grave loss. The legal dilemma was this:
>
> (a) on one hand, it would be good precedent for the court to not breathe life into any illegal contract so as to deter any person from considering to be embroiled in an illegal agreement. Good public policy would have it that no party should be allowed to seek any remedy from the court arising from illegal contracts. Otherwise, subjects of the law would not be deterred from entering into illegal contracts knowing that they can obtain some form of reparation vide the court; and
>
> (b) on the other hand, it would also be undesirable that the court would leave any 'victim' or co-conspirator to an illegal contract to be without remedy when his monies were unjustly kept in the possession and control of the other co-conspirator. This would unjustly enrich the other co-conspirator and thus, would encourage people to engage in nefarious schemes to defraud other co-conspirators knowing that they're unjust enrichment would not be curtailed by the court.

A [52] In view of the above dilemma, the UK Supreme Court decided that the court may order compensation arising from an illegal contract on the two conditions that:

(a) the order for compensation was not contrary to any public policy; and

(b) the order for compensation would not lead to a disproportionate reparation compared to the nature of the illegality involved.

B

...

[54] We must *APPROPRIATELY CAVEAT* that our application of the principle in *Patel v Mirza* (and our inclination to assist the appellants in the appeal before us) was incentivized by the specific and niche facts (which entailed the respondents' unconscionable conducts which would unjustly deprive a legitimate judgment creditor for monies which were legitimately due to be paid to the appellants). We remain in full and unmitigated agreement that as far and as much as possible, the courts shall not lend any hand to assist any persons to obtain any remedy whatsoever arising from an illegal contract.

C

D

[55] Even if the settlement agreement might offend the rule against undue preference (which we already found that it had not), public policy dictates that the respondents ought not to be left unscathed especially considering the fact that the respondents had taken the parties and even the courts for a ride for years. The respondents' unsavoury conducts by and large had undermined the integrity of the court and abused the process of the court.

E

[56] Thus, it would be vastly unjust and a total 'overkill' for us to simply invalidate the settlement agreement and deprive the appellants of just deserts. (Emphasis added.)

F

[67] Applying the above principle in the present case, it is glaring that the plaintiff's claim would have not satisfied the first criteria of the exception in *Patel v Mirza* (in that the nature of illegality, and an order for compensation for said illegality was clearly against public policy).

G

[68] It must be kept in mind that our nation in recent times have faced grave scandals, controversies, and criminalities at an unprecedented scale and prevalence. Public sensitivity and scrutiny so as to accountability as to monies, movement of monies, payment and receipt of monies, corruption and scandals is at an all-time high (as it should necessarily be).

H

[69] Our own Malaysian legal framework has prescribed meticulous laws, bye-laws, rules, and regulations to govern and police both domestic and international transactions especially those involving foreign exchanges and currencies. This framework was painstakingly drafted in hopes to curb criminality and corruption which by its very nature, often attempted to be concealed and shielded from the law.

I

[70] The above considered, I am of the considered view that the plaintiff

cannot simply sweep the illegal and dubious features of the impugned loan agreement under the rug and use the court process as a platform to 'roll the dice' in hopes that the court would somehow just focus on the supposed 'admission' of indebtedness via the two inexplicable undertakings. As the Court of Appeal previously had pointed out, the term agreed under the impugned loan agreement was sorely bizarre and most likely may either be an illegal moneylending scheme or a money laundering scheme instead. This is especially so considering the plaintiff's questionable readiness to abandon a half billion-Ringgit loan under the impugned loan agreement in favour of a 'refund' of a mere 1m Euros as per the two inexplicable undertakings.

[71] And since the plaintiff had failed to adduce any evidence to prove the contrary, the learned JC was correct to find that the impugned loan agreement and the undertakings were illegal and unenforceable.

[72] To allow any form of restitution or compensation to arise from the impugned loan agreement or the inexplicable undertakings would only breathe a semblance of legitimacy to the same illegalities. It would squarely be against public policy for us to set a precedent in which would only serve to open the floodgate to incentivise many unscrupulous personas to continue devising new and creative ways to delude the court and thereupon, abuse the court process to become the means to achieve their illegal ends.

DECISION

[73] Based on the aforementioned deliberations, the appellant's appeal here is totally devoid of merit and must be dismissed with costs. Thus, the High Court order and decision are hereby affirmed.

[74] The appellant is ordered to pay costs of RM40,000 to the respondent subject to allocator.

[75] My learned brother Justice Azhahari Kamal bin Ramli has read this judgment in draft and has expressed his concurrence whereas Justice Che Mohd Ruzima bin Ghazali has a dissenting view and has written a separate judgment.

Che Mohd Ruzima JCA:

DISSENTING JUDGMENT

[76] At the introduction in the grounds of judgment (GOJ), the learned JC explicitly acknowledged that the plaintiff's claim for 1m Euros is based on the defendant's breach of undertakings. Her Ladyship further acknowledged that

in the list of plaintiff's witnesses, the plaintiff is calling its sole witness, Chua Yu Sheng (PW1), and in the list of defendant's witnesses, there are four witnesses, the defendant herself, the Chairman of Noble Mettle LCC, the lawyer and the Bank Executive Officer to give evidence. However, the defendant elected not to call any witnesses at the end of the plaintiff's case and submitted no case to answer.

[77] On the law of 'no case to answer', the learned JC referred to three leading cases, that are, Supreme Court decision in *Jaafar bin Shaari & Anor (suing as administrators of the Estate of Shofiah bte Ahmad, DECEASED) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 (*Jaafar Shaari*'s case), Federal Court decision in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 and *Yui Chin Song & Ors v Lee Ming Chai & Ors* [2019] 6 MLJ 417; [2019] 7 CLJ 740. From the above cases, Her Ladyship correctly distilled the principles applicable when a defendant submits no case to answer as follows:

(a) at the close of the plaintiff's case, a defendant can opt not to call any witness for the defence but instead make a submission of 'no case to answer';

(b) where the defence submits 'no case to answer', the trial judge must put the defence counsel to his election, namely, that if he elects not call evidence, he will stand or fall on his submissions;

(c) the judge should refuse to make a ruling on a submission of 'no case to answer' unless the defence makes it clear that he does not intend to call any witness for the defence;

(d) for the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true (see *Jaafar Shaari's* case);

(e) adverse inference can be drawn against the defendant for failing to call any witnesses should the circumstances appropriately call for such an adverse inference (see *Jaafar Shaari's* case); and

(f) however, even if the plaintiff's evidence is presumed to be true and adverse inference is drawn, the burden of proof at all times is borne by the plaintiff on the balance of probabilities to establish his case against the defendant. It is for the plaintiff to prove his case and satisfy the court that his claim is well founded before the court can grant judgment on his claim. The fact that the defendant has led no evidence or called no witnesses does not absolve the plaintiff from discharging his burden in law (see *Jaafar Shaari*, Peh Swee Chin FCJ at p 519; *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim*; *Yui Chin Song & Ors v Lee Ming Chai & Ors* and *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd*).

[78] Meanwhile, the learned JC's decision delivered via e-review on 27 February 2023 was as follows: A

KEPUTUSAN BICARA PENUH

[1] Plaintif (Plf) memplidkan bahawa defendan telah menipu wang plaintif melalui suatu skim penipuan, kes perlanggaran kepercayaan jenayah (CBT), kemungkiran akujanji dan/atau representasi. Reliefs yang dipohon oleh plaintif ialah sebagaimana pada perenggan 22(a) hingga (n) pernyataan tuntutan. B

[2] Pada 1 Februari 2023, dalam perbicaraan penuh di hadapan mahkamah ini, plaintif telah memanggil seorang saksi iaitu En Chua Yu Sheng (saksi plaintif/SP), *project advisor to the CEO of* Ivory Properties Group Bhd. Penyata saksi SP difailkan dan SP disoal balas dan diperiksa balas. C

[3] Defendan mempunyai emapt orang saksi.

[4] Selepas plaintif menutup kesnya, peguam defendan berhujah 'no case to answer'. D

Analisa keterangan lisan dan dokumentar selepas bicara penuh dan dapatan mahkamah

[5] Dalam perbicaraan, mahkamah ini telah mendengar keterangan saksi plaintif.

[6] Keseluruhan keterangan SP gagal membuktikan tuntutan plaintif terhadap defendan. E

[7] Berkenaan dengan pilihan defendan 'no case to answer', nas undang-undang yang dipetik oleh pihak-pihak adalah dirujuk.

[8] Atas imbangan kebarangkalian, plaintif gagal untuk membuktikan perkara utama mengenai tuntutannya terhadap defendan. F

[9] Oleh yang demikian mahkamah ini memutuskan untuk menolak tuntutan plaintif dengan kos sebanyak RM10,000 (tertakluk kepada fi alokatur).

[79] Agrieved by the said decision, the plaintiff appealed. G

[80] Before us, the arguments put forward by learned counsel for the plaintiff in his written submissions, and orally submitted before us were aligned with the grounds of appeal listed in the memorandum of appeal filed by the plaintiff dated 26 May 2023. Learned counsel for the plaintiff primarily argued that the learned JC erred seriously in misdirecting herself in law and failed to apply the legal principles applicable to a submission of no case to answer. It was argued that, instead of assessing whether the plaintiff had established a prima facie case based on the evidence adduced, the learned JC tested the plaintiff's case and evidence against the defendant's unproven allegations and then, made findings against the plaintiff which occasioned a serious miscarriage of justice. It was further argued that the learned JC erred even more seriously in refusing to admit documentary evidence, namely, a document signed by the defendant and marked as ID1, despite the fact that the defendant herself had admitted H I

signing it. The learned JC failed to appreciate the existence of ID1 even though it was not in dispute. In short, it was argued that the learned JC had improperly handled the documentary evidence adduced by the plaintiff before her. It was finally argued that the learned JC was wrong in not drawing adverse inferences against the defendant who failed to call any evidence.

[81] From the reasons given in the memorandum of appeal and counsel for the plaintiff's arguments before us, it is clear that the plaintiff's appeal is mainly on the ground that the learned JC made a serious error of law and fact in handling a submission of no case to answer elected by the defendant. Thus, the main issue before us is, whether from the facts of the case, the learned JC correctly applied the legal principles applicable to a submission of no case to answer?

[82] The law on the election of no case to answer by the defendant after the plaintiff closes his case is well settled. Lord Omerod, in *Storey v Storey* [1960] 3 All ER 279 (*Storey*'s case) explained the two circumstances when a defendant would make such an election:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[83] From the notes of proceedings (NOP), it shows that learned counsel for the defendant had upon advice and taking instruction from the defendant, decided to submit no case to answer at the end of the plaintiff's case. The defendant's reason that can be gleaned from the NOP and in the submission by learned counsel for the defendant before the trial judge was that, the evidence produced by PW1 was so unsatisfactory and the plaintiff's primary witness, known as 'Dato' Low' was not called to give evidence. See pp 93 and 94 of encl 4. The learned JC agreed with learned counsel for the defendant's submission and it echoed in Her Ladyship's finding at para [23] of the GOJ as follows:

> [23] From the cross-examination of SP1, I have observed that SP1 has almost no knowledge of the fact of the case. In cross-examination, the plaintiff's witness, SP1 repeated claimed, 'I don't know' or 'I'm not sure'. SP1 even admitted that the person knowledgeable is Dato' Low.

Based on those circumstances, it seems that the defendant's stand to submit no case to answer is based on the second set of circumstances of the *Storey*'s case, that is, the evidence led for the plaintiff is so unsatisfactory or unreliable that

the burden of proof has not been discharged. A

[84] In relation to the submission of no case to answer, I would like to reiterate the principles of law distilled by the learned JC at para [77] above. One of the principles states that, when the plaintiff submits no case to answer, we must assume the truth or correctness of all the evidence presented. See Supreme Court decision in *Jaafar Shaari*'s case, Court of Appeal decision in *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85 (*Yoong Sze Fatt*'s case) and *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81 (*Mohd Nor Afandi*'s case). B C

[85] In a case where the defendant decided to submit no case to answer based on the second set of circumstances of the *Storey*'s case, the most pertinent question to be answered should be, whether the evidence led by the plaintiff, which must be presumed to be true or correct, was so unsatisfactory or unreliable that the burden on the plaintiff to prove its case against the defendant has not been discharged. D

[86] To begin with, we have to look at the plaintiff's pleaded facts. According to the plaintiff's statement of claim, a corporation based in the United States of America known as Noble Mettle Group ('Noble'), which was represented by the defendant who was the corporate representative and/or agent of Noble, offered and approved a loan of 102m Euros to the plaintiff pursuant to the Loan Offer Transaction Code: WWPT/JVT/ESOTERA/METTLE/100MEUR/12122016. The loan was subject to a condition that the plaintiff was first required to pay a sum of 1m Euros as the administrative and due diligence fee. Based on the arrangement, the plaintiff wired 100,000 Euros on 30 December 2016 direct to Noble and then, the amount of SGD1,362,850 which was equivalent to 900,000 Euros was paid to the defendant on her capacity as the representative of Noble. On the same day, the defendant via a written undertaking undertook to remit the 900,000 Euros to Noble and to procure an official receipt from Noble and/or bank transfer transaction slip to be provided to the plaintiff. See para 3 of the statement of claim. The defendant undertook to refund the 1m Euros if the defendant failed to remit the money to Noble or the loan of was not disbursed to the plaintiff according to the funding schedule to the loan offer. See paras 4 to 8 of the statement of claim. E F G H

[87] The plaintiff claimed that the defendant breached her undertakings dated 30 December 2016 when she failed to remit 900,000 Euros to Noble Mettle as the plaintiff was not provided with the official receipt from Noble or bank transfer transaction slip from the defendant. Hence, the plaintiff's claim for the refund of the 1m Euros. I

[88] As earlier mentioned, the learned JC explicitly acknowledged that the plaintiff's claim is based on the defendant's breach of undertakings. On this matter, it is also pertinent to note that the defendant herself at para 3 of the statement of defence, admitted all facts stated at paras 4 to 7 of the plaintiff's statement of claim. By admitting those facts, I have to agree with learned counsel for plaintiff's submission that there is a judicial admission by the defendant on the given undertaking. It is trite law that a judicial admission made in a pleading stands on a higher footing than an evidentiary admission and any failure on the part of the defendant to rebut the admission to avoid the legal consequences of his admission would entitle the plaintiff to enter judgment against the defendant. See Federal Court decision in *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478 at p 487.

[89] Next, we have to look at the evidence adduced by the plaintiff. The plaintiff's sole witness, Chua Yu Sheng ('PW1') averred in his witness statement marked as PSP1 that he is the project advisor to the Ivory Properties Group Bhd owned by Dato' Low Eng Hock, who is also a director and shareholder of the plaintiff. PW1 also averred that he knew the defendant who represented Noble in respect of the offshore loan. According to PW1, the defendant approached the plaintiff to offer the offshore loan initiated by Noble and had briefly described the loan arrangement between the parties.

[90] According to PW1, based on the agreed arrangement, the plaintiff paid 100,000 Euros directly to Noble and the balance of 900,000 Euros was paid to the defendant as the representative of Noble, who undertook to remit the money to Noble for the purpose of paying the administration and due diligence fee which was said to be fully refundable if the offshore loan cannot be disbursed for whatever reason. The defendant acknowledged the receipt of the money given by the plaintiff and issued an undertaking dated 30 December 2016 to remit the money to Noble. The plaintiff did not receive any original receipt from Noble or bank transfer slip from the defendant as proof of remittance. Under the undertaking, the defendant agreed to indemnify the plaintiff and refund 900,000 Euros upon written demand by the plaintiff if the defendant fails to remit the money to Noble.

[91] Besides that, there is another piece of evidence that was introduced by PW1 in PSP1. PW1 had been referred and asked a question about a letter in 'Ikatan Dokumen Bersama' at p 19, and his answer to the question is pertinent. PW1 positively averred that the document is the defendant's letter of undertaking and indemnity dated 23 October 2017. According to the letter of undertaking and indemnity, the defendant undertook to refund 1m Euros that was misappropriated by her to the plaintiff. PW1 further averred that from the plaintiff's record, the defendant only paid RM50,000 on 24 October 2017 under the letter of undertaking and indemnity dated 23 October 2017.

[92] Based on the pleadings of the parties, I am of the view that the learned JC failed to acknowledge the fact that there is a judicial admission by the defendant regarding the letter of undertaking dated 30 December 2016. As a matter of fact, the existence and contents of the letter were not in dispute. The defendant herself signed the letter of undertaking dated 30 December 2016 where she undertook to remit 900,000 Euro, which is equivalent to SGD1,362,850, to Noble and then to provide the official receipt or bank transfer transaction slip to the plaintiff.

[93] Based on the evidence adduced by the plaintiff through PW1, besides the letter of undertaking dated 30 December 2016, there is another letter of undertaking and indemnity dated 23 October 2017 given by the defendant to the plaintiff. Despite of the marking as an identified document ID1 by the court, the existence of the letter of undertaking and indemnity dated 23 October 2017 was never in dispute. The original copy of the said document was shown to PW1 during the trial and he acknowledged it. As a matter of fact, the defendant in her amended statement of defence dated 13 November 2017 at para 11 acknowledges the existence of the letter of undertaking and indemnity dated 23 October 2017, even though its content was disputed by the reason that she was forced to thumbprint and sign the document while she was detained in the police lockup. Again, I find that there is another judicial admission by the defendant as to the fact that the letter of undertaking and indemnity dated 23 October 2017 do exist.

[94] As to the challenged by learned counsel for the defendant against PW1 testimonies regarding the existence of both letters of undertaking, the NOP clearly shows that it was unsuccessful. The relevant excerpts of the NOP are as follows:

> PD1: You did not receive any receipt from Thomas Nelson for your 100,000. Now, I'm referring you to page 16 of Bundle B2. And Bundle B2, Thomas Nelson actually says he received from the 900,000 he received 774,000. And was this letter sent to you by way of exhibits earlier in the proceedings? Are you aware or not?
>
> CYS: Nope.
>
> PD1: Oh my god. You don't seem to know much. Yang Arif, he is making — Now, you refer to page, Question 28. Why, why, why the demand for EUR 1,000,000 from the Defendant. And look at your answer. It is because the Defendant agreed undertook to refund 1,000,000 if the loan of 102 was not dispersed. Now, I put it to you, I put it to you, Mr. Chua. I put it to you, look in the agreement, look at the agreement. Anything in the agreement to say that the Defendant, Jenny, what's the name? Tan Sew Cheng must give back 1 million EUR if the loan amount is not disbursed. Anything in the agreement I put it to you
>
> CYS: It's in the undertaking.
>
> PD1: No.

YA: No. you cannot say that, this is his answer.

PD1: Okay, okay, in undertaking, thank you.

YA: You cannot just say no.

PD1: Now, okay.

YA: This is his evidence before me.

PD1: Okay, yes, yes, sorry. Now let's go to the, let's go to the undertaking that you said. Because the undertaking dated — Sorry, Yang Arif, undertaking is at bundle, at Bundle B1. Let's go to undertaking. Now. This is the undertaking that he signed when he received the 900,000, right? Page 17, Yang Arif, page 17. Now look at page 18. I hereby agree to indemnify and keep fully indemnify for the full payment of the said sum. What is the said sum? I agree and fully indemnify for the full payment of the said sum in the event I fail to remit the sum, the above account and the sum shall be refunded to you.

YA: What document you referring to?

PD1: Yang Arif, Bundle B1, page 18. Page 18 and this undertaking. And the sum here. Look at page 17, the sum here, look at 1–2–3–4–5. Fifth Line, fifth line. The sum is identified as 900,000, right?

CYS: Yes

PD1: Okay, now look at page 18. Page 18, I agree to keep you indemnified, if the said sum. What sum is this. 900,000, right?

CYS: Yes

PD1: Yes. And if I'm negligent or omit to remit the sum, what sum is this?

CYS: 900.

PD1: 900,000, and the above account and the said sum. What sum is this?

CYS: 900.

PD1: Shall be refunded. Any, I put it to you there's nothing here to say that if the loan sum 102 is not given, I will refund. Nothing is said here. I put it to you. Agree or don't agree.

CYS: Don't agree.

PD1: It is my — This is in black and white

CYS: No, the —

PD1: No, no, no. Look at the agreement. Yang Arif, I will submit on this. You don't agree, right?

CYS: I don't agree.

PD1: You don't agree, although you read the answer out. You don't agree, right?

CYS: Yeah, I don't agree.

PD1: I will submit on that, I will submit. Now I move on. Move on. Yes, now. Earlier, we talked about that letter that was signed in the lock-up, in the lock-up. Okay. Are you, are you aware, are you aware that, that she was detained by the police in, in, in Penang?

CYS: No.

PD1: Yang Arif, my whole line of questioning collapse Yang Arif ...

[95] As for the other questions led by learned counsel for the defendant in his cross-examination on PW1, I find that all the questions were not related to the plaintiff's cause of action. To be specific, the question that PW1 is not privy to the main contract or transaction documents between the plaintiff and Noble has no bearing on the plaintiff's claim since the plaintiff's claim is premised on the defendant's undertakings and the breach of the undertakings. The same goes to the question on PW1's knowledge of how the cash in Singapore currency was made available to the defendant or whether the source of the said money is an illegal one, PW1's knowledge of the Bank Negara's approval, PW1's knowledge of the emergence of the letter of undertaking and indemnity dated 23 October 2017, the matters related to the detention of the defendant in the police lockup in Penang, and PW1's statement that 'Dato' Low' was knowledgeable of the facts of the case especially in relation to the contract with Noble are in my opinion does not in any way relevant facts which would affect the plaintiff's claim.

[96] The learned JC should not conveniently ignore PW1's oral testimony in her decision because it will contradict her own observation and the finding made during the hearing of the evidence. Even though it will be repetitious, the relevant excerpts of PW1's testimony where the learned JC made a ruling on PW1's answer to learned counsel for defendant's question regarding the letter of undertaking dated 30 December 2016 are as follows:

PD1: Oh my god. You don't seem to know much. Yang Arif, he is making — Now, you refer to page, Question 28. Why, why, why the demand for EUR 1,000,000 from the Defendant. And look at your answer. It is because the Defendant agreed undertook to refund 1,000,000 if the loan of 102 was not dispersed. Now, I put it to you, I put it to you, Mr. Chua. I put it to you, look in the agreement, look at the agreement. Anything in the agreement to say that the Defendant, Jenny, what's the name? Tan Sew Cheng must give back 1 million EUR if the loan amount is not disbursed. Anything in the agreement I put it to you

CYS: *It's in the undertaking*.

PD1: *No*.

YA: *No. you cannot say that, this is his answer*.

PD1: *Okay, okay, in undertaking, thank you*.

YA: *You cannot just say no*.

PD1: Now, okay.

YA: *This is his evidence before me*. (Emphasis added.)

[97] From the observation made, it is clear that the learned JC accepted PW1's testimony in relation to the plaintiff's claim which is based on the letter of undertaking dated 30 December 2016. Hence, applying the principle of law on the submission of no case to answer, the learned JC should assume that the evidence adduced by PW1 must be true or correct. Obviously, Her Ladyship is plainly wrong in her conclusion that the plaintiff failed to proof its case by merely depending on the fact that PW1 had given an unsatisfactory answer during the cross-examination.

[98] Furthermore, the law on the effect of an answer given during cross-examination, is clear. The answer given would not constitute the calling of evidence for the defendant where the defendant submitted no case to answer. On this proposition of law, RK Nathan in his book *Nathan on Negligence* (1st Ed) (1998), had this to say at p 267:

> In any case, if a defendant elects not to call evidence he is bound by that election. However, he must be permitted to make a final address. The court would have to hear the evidence of the other defendants and their witnesses and their submission, including the submission of the party making the election before determining whether the plaintiff had made out a case against any of the defendants. *Cross-examination would not constitute the calling of evidence* and the party making the election is not precluded from cross-examining the other defendants and their witnesses. *A defendant is not under an obligation to give evidence but he cannot complain if, on a narrow balance of probability the evidence justified, the court in drawing the inference of negligence against him*. (Emphasis added.)

Again, it is plainly wrong for the learned JC to depend heavily on the answer given by PW1 during the cross-examination to form a conclusion that the plaintiff failed to prove its case and the defendant has succeeded in her submission of no case to answer.

[99] Back to the letter of undertaking dated 30 December 2016, the language used is simple and straight forward. The defendant agreed and undertook to remit 900,000 Euros to Noble and she should procure the official receipt from Noble or a bank transfer transaction slip, and provide the same to the plaintiff. None was given based on the PW1's testimony which would be presumed to be true or correct. From the defendant's amended statement of defence, there are explanations as regard to the receipt from Noble. However, as clearly pleaded in para 6 of the defence, the acknowledgement receipt given by Noble only dated on 9 October 2017 and 17 October 2017. From those dates, it clearly shows that the acknowledgement was given after the plaintiff's filed his statement of claim on 29 September 2017. By the submission of no case to

answer, the defendant lost her opportunity to explain why there was delay in the acknowledgement by Noble which obviously supports the plaintiff's contention that the defendant failed to furnish the acknowledgement receipt in contravention of the letter of undertaking dated 30 December 2016. Thus, without such explanation, the plaintiff's evidence that the defendant breached the letter of undertaking dated 30 December 2016 stands unrebutted.

[100] As for the letter of undertaking and indemnity dated 23 October 2017, the fact about the existence of the said letter was not pleaded in the statement of claim since its existence was after the plaintiff's issue the writ summons. However, the defendant made a judicial admission in her amended statement of defence at para 11 that after the plaintiff's filed its claim, the defendant was forced to sign the letter of undertaking and indemnity dated 23 October 2017 while she was detained in the police custody. Based on that fact, the plaintiff's evidence on the existence of the letter of undertaking and indemnity dated 23 October 2017 was not disputed. By taking a stand to submit no case to answer, the defendant once again lost her opportunity to prove that the thumb printed and signed letter of undertaking and indemnity dated 23 October 2017 was obtained under duress and not voluntarily given. This fact further reinforced the judicial admission that the defendant undertook to refund 1m Euros to the plaintiff for breaching of undertakings.

[101] Based on the evidence adduced, the plaintiff had sufficiently proofed a prima facie evidence against the defendant based on PW1's testimony and the contemporaneous documents tendered or referred to. From the learned JC's GOJ, it is obvious that the basic principle that the court should accept the evidence adduced by the plaintiff as true or correct in a case where the defendant elected to submit no case to answer, is not properly addressed. Therefore, I am of the considered view that the plaintiff had on balance of probability proved that the defendant breached her undertakings as claimed. Therefore, the learned JC is plainly wrong in her decision to dismiss the plaintiff's claim.

[102] Related to the same issue on submission of no case to answer, it is apparent from the GOJ that the learned JC had placed undue reliance on the reasons given by the Court of Appeal in another appeal filed by the defendant in opposing a summary judgment obtained by the plaintiff. See the case of *Tan Sew Cheng v Worldwide Platinum Records Sdn Bhd* [2020] MLJU 248. I am of the opinion that such reliance is misplaced since the Court of Appeal's considerations and decisions are totally on different footings. In that appeal, the Court of Appeal found that there are arguable defences pleaded by the defendant on what exactly the defendant's obligation under the undertakings, and whether there has been due performance by the defendant. Before us, the defences put up by the defendant are no longer relevant upon the election by

A the defendant to submit no case to answer.

[103] Besides that, the Court of Appeal also found that there are issues of whether there are violations or contraventions of any laws and regulations related to banking, anti-money laundering and other illegalities. It is pertinent B to note that all these issues are parts of the defendant's pleaded defence. Again, upon the submission of no case to answer, the issues raised by the defendant in her defence on the contraventions of laws and the illegalities are no longer relevant. So, it is unfair for the defendant to label PW1 as an unreliable witness C just for not being able to answer questions which are totally related to her own defence.

[104] In such a situation, the learned JC erred in accepting learned counsel for defendant's submission and decided to test the plaintiff's case against the D defendant defence as can be seen in para [27] of the learned JC's GOJ. In *Sinarlim Sdn Bhd v Medallion Builders Sdn Bhd (dahulunya dikenali sebagai RC-Soils (M) Sdn Bhd) and others application* [2012] MLJU 847, Mary Lim J (as Her Ladyship then was) referred to the decisions in *Jaafar Shaari*'s case, *Mohd Nor Afandi*'s case, *Yoong Sze* Fatt's case and Federal Court's decision in E *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, and then she made the following observation:

> [28] Hence, a submission is made by a defendant who, '... accepting the plaintiff's evidence at its face value ...' says that '... no case has been established in law ...'. Alternatively, the submission is made where the defendant says '... that the evidence F led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.
>
> [29] It must be recorded the election made by the defendant. Upon election, the defendant is bound. In this case, as mentioned at the outset, this was accordingly done and the defendant elected not to lead evidence but to press ahead with its G submissions in relation to all three claims. Once elected, the defendant cannot thereafter change its mind and ask to lead evidence of any sort in the event its submissions are not accepted by the court. *I must say that with this election and submission, the defences pleaded are immaterial and not available for consideration*. (Emphasis added.)

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[105] To conclude, based on the trite principle of law on the submission of no case to answer, it is obvious that the learned JC was plainly wrong in her decision to reject the plaintiff's evidence especially the two letters of undertaking since the existence of the documents were admitted in the I defendant's own pleadings. When the defendant elected to submit no case to answer, the plaintiff's claim must be dealt with on the evidence as it stands, and the only evidence as it stands before the court is the evidence called by the plaintiff. The learned JC further erred when she decided to test the plaintiff's case against the defendant defence particularly on the issue of illegalities of the

impugned loan transacted between the plaintiff and Noble, which in any case are irrelevant.

CONCLUSION

[106] For the foregoing reasons, in my judgment, which departs from the views expressed in the majority decision and the conclusion arrived at, there are merits in this appeal, particularly on the point of law and facts on the submission of no case to answer. I would, therefore, conclude that appellate intervention is warranted in this appeal which should, accordingly be allowed. The learned JC's decision should be set aside and substituted with an order that the plaintiff's claim to be allowed with cost here and below.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh